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No. 09-471

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARSHA FALCHENBERG,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF EDUCATION, THE STATE OF NEW YORK, AND NATIONAL EVALUATION SYSTEMS, INC., A/K/A NYSTE PROGRAM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT NATIONAL EVALUATION SYSTEMS, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May Respondents lawfully require Petitioner to demonstrate her ability to spell on a teacher certification examination that includes spelling among its evaluated skills?

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT NATIONAL EVALUATION SYSTEMS, INC.

Respondent National Evaluation Systems, Inc. ("NES") does business as Evaluation Systems group of Pearson and is a business unit of NCS Pearson, Inc. NCS Pearson, Inc. is ultimately owned by Pearson plc (a company based in the United Kingdom).

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INTRODUCTION

This case arises from Petitioner's request for an accommodation that would have excused her from demonstrating her ability to spell on a teacher-certification examination that includes spelling among its tested skills. As both the District Court and the Second Circuit Court of Appeals correctly held, the requirement that a disabled individual demonstrate skills objectively measured on a licensing or certification examination does not, as a matter of law, discriminate on the basis of a disability. Because these courts' decisions are squarely grounded in the express text of the Americans with Disabilities Act and this Court's prior decisions, and because Petitioner expresses little more than a disagreement with these courts' application of this settled law to the facts, this case presents no compelling ground for further review. This Court should refuse to grant the requested writ of certiorari.

Granting the writ is particularly inappropriate in this case because, were this Court to grant the writ, a significant amount of briefing would necessarily be dedicated to the correction of factual errors in Petitioner's briefing. Petitioner has mischaracterized or misstated facts that are in the record. It is therefore a primary purpose of this opposition, pursuant to Sup. Ct. R. 15, to address and preserve Respondent's objections to misstatements of fact in the petition.

STATEMENT OF THE CASE

Petitioner requested as an accommodation for her disability an exemption from the requirement that she demonstrate her ability to spell on a teacher-certification examination. Her requested accommodation was denied because the examination evaluates every candidate's ability to spell. Therefore, the requested exemption, if granted, would have prevented the accurate measurement of Petitioner's performance on the examination. The law expressly permits denial of an accommodation under these circumstances.

The examination at issue in this case is the Liberal Arts and Sciences Test ("LAST"), a teacher-certification examination that all candidates for public-school teacher certification in the State of New York are required by law to take and pass in order to become certified teachers. Respondent NES developed, administers and scores the LAST under contract with the State of New York. The LAST is a "paper-and-pencil" test, consisting of multiple-choice questions and a written assignment (essentially a short written essay).

The record establishes without genuine dispute that among the scored skills on the LAST's written assignment are proper construction of paragraphs and sentences; proper use of grammar; proper punctuation and capitalization; and, most importantly for the purposes of the petition, correct spelling. The written assignment requires the examinee to "[p]repare

an organized, developed composition in edited American English in response to instructions regarding audience, purpose, and content." It is required to be the examinee's original work, written in his or her own words, and not copied or paraphrased from some other work. The examinee's response to the written assignment is measured (i.e., scored) on the basis of several criteria, among them the following:

> STRUCTURE AND CONVENTIONS: Express oneself clearly and without distractions caused by inattention to sentence and paragraph structure, choice and use of words, and mechanics (i.e., spelling, punctuation, capitalization).

The written assignment is evaluated and scored on a 4-point scale, with "4" being the highest score and "1" being the lowest. Each of the four possible scores is based on consideration of a number of factors, including spelling, punctuation, capitalization, and paragraphing. For example, a "4" response is described in the LAST scoring scale in pertinent part as follows:

> The response is free of distracting flaws in sentence structure (e.g., subject-verb disagreements, run-on sentences) and paragraph structure (e.g., lack of paragraph breaks to coincide with thought transitions), shows proficient use and choice of words, and avoids disruptive mechanical errors (e.g., inappropriate capitalization, misspellings of common words).

These scoring criteria are clearly set forth in the LAST Preparation Guide, which was introduced into evidence in the District Court.

Petitioner Marsha Falchenberg registered to take the LAST several times in 2002 and 2003. Relying on a claimed disability that impairs her ability to spell many words correctly, Petitioner sought certain testing accommodations to compensate for her disability. Specifically, in her final registration for the LAST, Petitioner requested the following accommodations: "reader, scriber, extra time, oral." In response, NES offered to provide Petitioner with a reader to read each test question to her; a transcriber to write down her dictated written assignment for her; extra time to take the test, and a separate room to avoid distractions from other test takers. But because spelling, punctuation, capitalization and paragraphing are among the skills evaluated in scoring the written assignment on the LAST, NES specified that Petitioner would be required to indicate to the transcriber her own spelling, punctuation, capitalization and paragraphing, so that the skills being evaluated would be those of Petitioner and not those of her transcriber. Petitioner objected to this requirement and failed to appear to take the LAST.

After learning that she would be required to demonstrate her own spelling (and other skills) on the LAST, Petitioner sued Respondent NES, the State of New York, the New York State Education Department, the New York City Department of Education, and the City of New York. She alleged that these

parties failed reasonably to accommodate her claimed disability on the LAST, and that this alleged failure resulted in her termination as a New York City public-school teacher. She asserted claims under Titles II and III of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, the New York State Human Rights Law, and the New York City Human Rights Law. She also sought to hold the Defendants liable under various theories of aiding-and-abetting liability.

Importantly, Petitioner's pleadings, even as amended, include no allegation that the LAST is *itself* discriminatory or otherwise unlawful. Thus, Petitioner has never challenged the validity or job-relatedness of the LAST. Accordingly, Petitioner's arguments that testing spelling is unrelated to the underlying purpose of the LAST are unsupported by the procedural and evidentiary history of this case.

Petitioner's briefing contains several other misstatements or mischaracterizations of the factual record, the most egregious of which are addressed here to preserve Respondent's objections to misstatements of fact in the petition pursuant to Sup. Ct. R. 15.

First, Petitioner was granted every reasonable accommodation she requested. In response to Petitioner's request for the accommodations of a "reader, scriber, extra time, [and] oral," NES offered to provide Petitioner with a reader to read each test question to her, a transcriber to write down her dictated written

assignment for her, extra time to take the test (nine hours rather than the normal four hours), and a separate room to avoid distractions from other test takers. Petitioner does not take issue with any of the granted accommodations, but argues that the requirement that Petitioner indicate to the transcriber her own spelling, punctuation, capitalization and paragraphing violates federal law.

Second, contrary to the suggestions in her briefing, Petitioner never requested the use of a spellchecker on the LAST. Although she at one point requested a dictionary, that request was denied – and subsequently withdrawn by Petitioner – because it would fundamentally alter the measurement of certain of the skills the LAST is intended to test (e.g., spelling). Petitioner is correct that spellcheckers are not permitted on the LAST – to permit outside assistance with spelling on the examination (either through a mechanical spelling aid or a human spelling assistant) would obviously interfere with the scoring of the LAST. But Petitioner never requested a spellchecker, so her argument addressing the prohibition on the use of spellcheckers addresses nothing more than a hypothetical.

Third, Petitioner is incorrect that a spellchecker was ever permitted as an accommodation on the LAST. Contrary to Petitioner's statements on pages 3 and 4 of her petition, there is no evidence in the record establishing that a spellchecker, or any other

spelling aid, has ever been permitted on the LAST.[1] In fact, spellcheckers are specifically *excluded* as an available alternative testing arrangement on the LAST, because such an accommodation may not ensure the accurate assessment of the required knowledge and skills that are being tested.

Another egregious misstatement of the record is Petitioner's contention that forty-nine states other than New York permit the use of a spellchecker on teacher-certification examinations. First, as mentioned, Petitioner never requested the use of a spellchecker. Second, there is no competent evidence in the record that *every* other state in the country permits the use of a spellchecker on all teacher-certification examinations. Third, there is no evidence in the record that any of the teacher-certification tests in the states that do permit spellcheckers evaluate candidates *on the basis of their spelling*. Obviously, the use of a spellchecker on other examinations that do not test spelling would not fundamentally alter a tested skill. Without evidence that such tests actually test spelling, as the LAST indisputably does, Petitioner's misleading attempt to analogize them to the LAST fails.

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[1] Spellcheckers have been permitted in the past on certain New York teacher certification tests that do not evaluate spelling as a test scoring criterion. But those aids have never been permitted on the LAST, and Petitioner has offered no evidence to the contrary.

Finally, Petitioner mischaracterizes the District Court's opinion. The District Court did not hold that "any alteration of a test procedure is a fundamental alteration as a matter of law." (Petition at 6.) Rather, the District Court held that an accommodation that would prevent the evaluation of a measured skill effectuates a fundamental alteration. Because the requested accommodation in this case would prevent accurate measurement of Falchenberg's spelling, Falchenberg is not requesting alteration of a "test procedure"; instead, she is requesting an alteration that would prevent evaluation of a measured skill. Perhaps another case exists where "alteration of a test procedure" would not fundamentally alter the examination, but those are not the facts of this case.

The United States District Court for the Southern District of New York, after dismissing the New York City Defendants in a previous order, granted the motions for summary judgment of NES and the New York State Defendants on all claims. Petitioner appealed that decision to the Court of Appeals for the Second Circuit. In an opinion grounded squarely in the text of the ADA and this Court's jurisprudence, the Second Circuit affirmed the District Court, holding in relevant part that (1) it is factually undisputed that spelling is among the skills tested on the LAST; (2) Petitioner's competency at spelling cannot be tested without requiring her actually to spell; and (3) Petitioner's request for an accommodation that would not require her to spell would effectuate precisely the type of fundamental alteration that need not be granted as a matter of law.

Petitioner promptly moved for reconsideration of that affirmance, filing her motion on June 22, 2009. The Second Circuit denied that motion on July 16, 2009, and this petition for certiorari followed.

REASONS FOR DENYING THE WRIT

1. The ADA Expressly Permits Test Administrators to Deny a Requested Accommodation that would Prevent the Measurement of a Tested Skill.

Disabled individuals are entitled to receive "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004); *see generally* 42 U.S.C. § 12182(a) (setting forth the ADA's general rule prohibiting public accommodations from discriminating against individuals because of their disabilities). But by the plain language of the ADA, a requested accommodation that would "fundamentally alter" the service, program, or activity being provided (in this case, the LAST certification examination), need not be granted as a matter of law. 42 U.S.C. § 12182(b)(2)(A)(ii); *see also* 28 C.F.R. § 35.130(b)(7) (same); *PGA Tours, Inc. v. Martin*, 532 U.S. 661, 682 & 688-690 (2001) (accommodation that would effect fundamental alteration of service provided, including waiver of "an essential rule . . . for anyone," need not be granted).

For certification examinations such as the LAST, the Code of Federal Regulations provides guidance for determining whether a requested accommodation effectuates a "fundamental alteration." Examinations must be selected and administered so as to ensure that, when administered to an individual with a disability, the examination results do not reflect the individual's impaired ability or skill, "*except where those skills are the factors that the examination purports to measure. . . .*" 28 C.F.R. § 36.309(b)(1)(i) (emphasis added); *see also* 28 C.F.R. § 36.309(b)(3) (requests for accommodation on examination need not be granted if they would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test. . . ."). Thus, where a test applicant seeks an accommodation that would prevent resulting scores from accurately evaluating skills intended to be measured by the test, the denial of the requested accommodation is appropriate. *Powell*, 364 F.3d at 89; *see also Florida Bd. of Bar Examiners re S.G.*, 707 So. 2d 323, 325 (Fl. 1998) ("A modification in the scoring of an exam is, by its very nature, a modification which 'fundamentally alters the measurement of the skills or knowledge the examination is intended to test' . . . [and] is not required under the ADA.").

Two uncontested material facts establish that Petitioner's requested accommodation in this case would fundamentally alter the LAST by preventing Respondent from accurately evaluating the skills the examination intends to measure:

- Spelling is measured in scoring every candidate's performance on the LAST.
- Petitioner's requested accommodation for an "oral" examination, *without* the requirement that she demonstrate her spelling to a transcriber, would prevent Respondent from measuring Petitioner's ability to spell.

This case begins and ends with these facts. If Petitioner were excused from indicating her own spelling ability to a transcriber, the resulting composition would exhibit the transcriber's spelling skill, not Petitioner's. Similarly, if Petitioner were permitted to use a dictionary – or any spelling aid, such as a mechanical spellchecker – it would prevent Petitioner's spelling from being assessed at all. The obvious and inescapable consequence would be that Petitioner's score on the LAST would not mean the same thing as the identical score by another test-taker. Accordingly, the District Court did not err in granting summary judgment, and the Second Circuit's affirmance is appropriate.

Petitioner does not argue that the authorities cited by Respondent are incorrect, inconsistent with the ADA, or unconstitutional. Rather, her primary contention appears to be that the District Court and Second Circuit's decisions are inconsistent with this Court's decision in *PGA Tours, Inc. v. Martin*, 532 U.S. 661 (2001). That contention is misplaced.

In *Martin*, this Court held that a disabled golfer's request to use a golf cart in a professional golfing tournament would not fundamentally alter the nature of the tournament. Mr. Martin required a golf cart to move about a golf course because of a condition resulting in congenital leg weakness. The PGA Tour, claiming that walking was part of the game of golf, barred his use of golf carts. He brought suit, claiming he was deprived of a reasonable accommodation.

The magistrate judge in *Martin* found that the ability to walk distances was incidental to the game of golf, which is fundamentally about the ability to plan and execute golf shots. This Court agreed, noting that the use of carts is not itself inconsistent with the fundamental character of the game of golf, which is the ability to make shots using clubs in as few strokes as possible. 532 U.S. at 683. Because the rule banning carts was at best "peripheral" to the game of golf, Mr. Martin's requested accommodation did not fundamentally alter the service provided. *Id.* at 690.

Importantly, Mr. Martin did not seek an accommodation that altered a measured skill in the game of golf. For example, he did not ask for a several stroke handicap on every hole, for larger-diameter holes, or for a shorter distance to the hole that would apply only to him. In contrast, Petitioner has asked for an accommodation that does interfere with measurement of a tested skill, and which is therefore not incidental or peripheral to the LAST. Spelling is a specifically-measured skill on the LAST. The use of a

spellchecker or other spelling aid on the LAST would directly interfere with NES's evaluation of Petitioner's spelling, and would thus effect a fundamental alteration of the examination wholly unlike the use of a golf cart in the game of golf.

The Court in *Martin* also found that the purpose of the PGA Tour walking rule is to subject players to fatigue, and that Mr. Martin's disability would cause him to endure greater fatigue even with a cart than his able-bodied competitors do by walking. Accordingly, the purpose of the walking rule was not fundamentally altered by allowing Mr. Martin to use a cart. *Id.* at 690. In contrast, the purpose of the rule banning spellcheckers (and of the proviso requiring Petitioner to indicate her own spelling to a transcriber) is to permit NES to evaluate every examinee's spelling. If Petitioner were permitted to use a spellchecker, or if the transcriber spelled words for her, then NES could not evaluate Petitioner's spelling. Accordingly, Petitioner's request to be relieved from demonstrating her own spelling, if granted, would fundamentally alter the purpose of New York's requirement that every LAST examinee demonstrate his or her own ability to spell. Similarly, Petitioner's request is antithetical to the well-established principle that NES is *not* required to alter or waive measurement of the skills objectively measured by the LAST. *See* 42 U.S.C. § 12182(b)(2)(A)(ii), *supra*; 28 C.F.R. § 36.309(b)(3), *supra*.

Petitioner's request to be excused from demonstrating spelling and other cores skills is not a

request for an accommodation. Rather, Petitioner is asking for a fundamentally different examination that only she would take. The State is not obligated to certify teachers who cannot pass fair and valid tests of basic skills. NES granted every reasonable accommodation Petitioner requested, and NES is not liable under the ADA simply because Petitioner is unable, even with a full panoply of reasonable accommodations, to pass a properly chosen and administered test.[2]

The District Court and the Court of Appeals were competent to consider and decide whether the request to be excused from demonstrating spelling on the LAST would effectuate a fundamental alteration if granted. If this Court granted the writ of certiorari in this case, its resolution of this case would require nothing more than a re-examination of the same facts considered by these courts. The petition for writ therefore raises no compelling issues, and should be denied.

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[2] In fact, Petitioner has never taken the LAST examination, with or without the requested accommodations. Petitioner's failure to take the LAST provided an independent ground for the dismissal of her Complaint at summary judgment, as she cannot establish a "concrete and particularized" injury-in-fact that is neither conjectural nor hypothetical, and consequently lacks the actual injury necessary for Article III standing to pursue claims with respect to the administration of the LAST. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

2. Petitioner's Argument that New York Alone Among the States Prohibits Spellcheckers on Teacher Certification Examinations is Unsupported by Any Competent Evidence.

Petitioner challenges NES's prohibition on the use of a spellchecker (which she never requested) by declaring that "the rest of the country permits a spell checker as an accommodation for the essay portions of their teacher's certification tests." (Petition at 10). This challenge is not supported by competent evidence. First, Petitioner never requested a spellchecker. Her challenge to New York's prohibition on the use of spellcheckers on the LAST therefore presents a hypothetical question unrelated to the request for accommodations actually at issue in this case. Second, and most importantly, Petitioner makes the bare assertion that the other forty-nine states permit the use of a spellchecker. Although the record contains evidence that some other states permit a spellchecker for certain examinations, there is no evidence in the record that any of the tests in any other state evaluate candidates *on the basis of their spelling*. Obviously, the use of a spellchecker on other examinations that do not test spelling would not fundamentally alter a tested skill. Petitioner's failure to demonstrate that these tests, like the LAST, evaluate spelling skills renders this evidence meaningless. This argument thus creates no compelling reason for granting the writ of certiorari in this case.

3. The Courts Below Appropriately Interpreted the Applicable Sections of the ADA.

As her final argument, Petitioner argues that courts generally apply the ADA too narrowly. But Petitioner fails to articulate how the courts *in this case* applied the ADA too narrowly. As explained *supra*, the District Court and the Second Circuit properly applied clearly-defined law that the Petitioner does not challenge. Indeed, the one code section that Petitioner cites in support of this argument simply has nothing to do with this case. Petitioner cites the ADA Amendments Act of 2008, which broadens the definition of the term "disability" under the Act. But for the purposes of the summary-judgment issue now on appeal, Respondent conceded (and the courts below assumed) that Petitioner has the requisite disability. This argument, like the rest of the petition, provides no basis for granting the writ of certiorari in this case.

CONCLUSION

The objective measurement of tested skills does not violate any person's right to reasonable accommodations under the Americans with Disabilities Act. The Court of Appeals for the Second Circuit properly stated this rule of law, and properly reviewed the District Court's application of that law to the facts of this case. The Petitioner raises nothing more than a disagreement with the factual findings of these

courts. Petitioner's obstinate disagreement with those findings provides no compelling reason for this Court to exercise its discretion to grant the requested Writ of Certiorari. Respondent respectfully requests that this Court deny the petition.

This 18th day of November, 2009.

Respectfully submitted,

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